

ORIGINAL

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7 UNITED STATES OF AMERICA



8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 v.
13 JASON ANDREW MCGILVRAY,
14 Defendant.

Case No. 19CR3222-H

PLEA AGREEMENT

16 IT IS HEREBY AGREED between the plaintiff, UNITED STATES OF AMERICA,
17 through its counsel, Robert S. Brewer, Jr., United States Attorney, and
18 Oleksandra Y. Johnson, Assistant United States Attorney, and defendant,
19 JASON ANDREW MCGILVRAY, with the advice and consent of Julie H. Ledesma,
20 Esq., counsel for defendant, as follows:

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28 OYJ: 7/30/19

RECEIVED IN
DOCKETING

AUG 26 2019

Def. Initials

I

THE PLEA

A. THE CHARGE

Defendant agrees to waive Indictment and plead guilty to a single-count Information charging defendant with:

On or about February 16, 2019, within the Southern District of California, defendant JASON ANDREW MCGILVRAY, while acting under color of law, as a United States Border Patrol Agent, struck B.S.S., willfully depriving him of the right, secured and protected by the Constitution and laws of the United States, to be free from unreasonable use of force, in violation of Title 18, United States Code, Section 242.

II

NATURE OF THE OFFENSE

A. ELEMENTS EXPLAINED

The offense to which defendant is pleading guilty has the following elements:

1. The defendant was acting under color of law when he committed the acts charged in the information;
2. The defendant deprived B.S.S. of his right to be free from unreasonable force, which is a right secured by the Constitution or laws of the United States;
3. The defendant acted willfully, that is, the defendant acted with a bad purpose, intending to deprive B.S.S. of that right.

B. ELEMENTS UNDERSTOOD AND ADMITTED - FACTUAL BASIS

Defendant has fully discussed the facts of this case with defense counsel. Defendant has committed each element of the crime and admits that there is a factual basis for this guilty plea. The following facts are true and undisputed:

1. On or about February 16, 2019, defendant was a Border Patrol Agent assigned to the Calexico Border Patrol Station in Calexico, California.
2. On the same date, while on duty, Defendant encountered B.S.S., who attempted to enter the United States by

jumping the international border fence near Gordon's Well, Imperial County, California.

3. On the same date, after B.S.S. was apprehended by Border Patrol Agents and placed in custody, Defendant willfully struck B.S.S. in the face with the intent to deprive B.S.S. of his constitutional right against unreasonable force during search and seizure.

III

PENALTIES

The crime to which Defendant is pleading guilty carries the following penalties:

- A. a maximum 1 year in prison;
- B. a maximum \$100,000 fine;
- C. a \$25 special assessment; and
- D. a maximum period of supervised release up to 1 year.

IV

DEFENDANT'S WAIVER OF TRIAL RIGHTS AND UNDERSTANDING OF CONSEQUENCES

This guilty plea waives Defendant's right at trial to:

- A. Continue to plead not guilty and require the Government to prove the elements of the crime beyond a reasonable doubt;
- B. A speedy and public trial by jury;
- C. The assistance of counsel at all stages of trial;
- D. Confront and cross-examine adverse witnesses;
- E. Testify and present evidence and to have witnesses testify on behalf of defendant; and
- F. Not testify or have any adverse inferences drawn from the failure to testify.

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V

**DEFENDANT ACKNOWLEDGES NO PRETRIAL RIGHT TO BE
PROVIDED WITH IMPEACHMENT AND AFFIRMATIVE DEFENSE INFORMATION**

Any information establishing the factual innocence of Defendant known to the undersigned prosecutor in this case has been turned over to Defendant. The Government will continue to provide such information establishing the factual innocence of defendant.

If this case proceeded to trial, the Government would be required to provide impeachment information for its witnesses. In addition, if Defendant raised an affirmative defense, the Government would be required to provide information in its possession that supports such a defense. By pleading guilty, defendant will not be provided this information, if any, and defendant waives any right to this information. Defendant will not attempt to withdraw the guilty plea or file a collateral attack on the existence of this information.

VI

**DEFENDANT'S REPRESENTATION THAT GUILTY
PLEA IS KNOWING AND VOLUNTARY**

Defendant represents that:

- A. Defendant has had a full opportunity to discuss all the facts and circumstances of this case with defense counsel and has a clear understanding of the charges and the consequences of this plea. By pleading guilty, Defendant may be giving up, and rendered ineligible to receive, valuable government benefits and civic rights, such as the right to vote, the right to possess a firearm, the right to hold office, and the right to serve on a jury. The conviction in this case may subject Defendant to various collateral consequences, including but not limited to revocation of probation, parole, or supervised release in another case; debarment from government contracting; and suspension or revocation of a professional license, none of which can serve as grounds to withdraw Defendant's guilty plea;
- B. No one has made any promises or offered any rewards in return for this guilty plea, other than those contained in this agreement or otherwise disclosed to the court;

1 C. No one has threatened Defendant or Defendant's family to
induce this guilty plea; and,

2 D. Defendant is pleading guilty because Defendant is guilty and
3 for no other reason.

4 VII

5 **AGREEMENT LIMITED TO U.S. ATTORNEY'S OFFICE,**
6 **SOUTHERN DISTRICT OF CALIFORNIA**

7 This plea agreement is limited to the United States Attorney's
8 Office for the Southern District of California, and cannot bind any
9 other authorities in any type of matter, although the Government will
10 bring this plea agreement to the attention of other authorities if
requested by Defendant.

11 VIII

12 **APPLICABILITY OF SENTENCING GUIDELINES**

13 The sentence imposed will be based on the factors set forth
14 in 18 U.S.C. § 3553(a). In imposing the sentence, the sentencing judge
15 must consult the United States Sentencing Guidelines (Guidelines) and
16 take them into account. Defendant has discussed the Guidelines with
17 defense counsel and understands that the Guidelines are only advisory,
18 not mandatory. The Court may impose a sentence more severe or less
19 severe than otherwise applicable under the Guidelines, up to the maximum
20 in the statute of conviction. The parties will recommend immediate
21 sentencing without a presentence report. The Court may agree if it
22 finds sufficient information in the record to enable the meaningful
23 exercise of sentencing authority pursuant to 18 U.S.C. § 3553. Defendant
24 has been advised and understands that should the sentencing judge order
25 a presentence report, defendant nevertheless has no right to withdraw
26 the plea. Nothing in this plea agreement limits the Government's duty
27 to provide complete and accurate facts to the district court and the
28 U.S. Probation Office.

IX

SENTENCE IS WITHIN SOLE DISCRETION OF JUDGE

This plea agreement is made pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B). The sentence is within the sole discretion of the sentencing judge who may impose the maximum sentence provided by statute. It is uncertain at this time what Defendant's sentence will be. The Government has not made and will not make any representation as to what sentence Defendant will receive. Any estimate of the probable sentence by defense counsel is not a promise and is not binding on the Court. Any recommendation made by the Government at sentencing is also not binding on the Court. If the sentencing judge does not follow any of the parties' sentencing recommendations, Defendant will not withdraw the plea.

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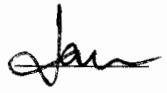
PARTIES' SENTENCING RECOMMENDATIONSA. SENTENCING GUIDELINE CALCULATIONS

Although the Guidelines are only advisory and just one factor the Court will consider under 18 U.S.C. § 3553(a) in imposing a sentence, the parties will jointly recommend the following Base Offense Level, Specific Offense Characteristics, Adjustments, and Departures:

- | | |
|---|----|
| 1. Base Offense Level [USSG § 2H1.1(a)(3)] | 10 |
| 2. Specific Offense Characteristic
[USSG §2H1.1(b)(1)] | +6 |
| 3. Acceptance of Responsibility [§ 3E1.1] | -3 |

B. ACCEPTANCE OF RESPONSIBILITY

Despite paragraph A above, the Government need not recommend an adjustment for Acceptance of Responsibility if Defendant engages in conduct inconsistent with acceptance of responsibility including, but not limited to, the following:



1. Fails to truthfully admit a complete factual basis as stated in the plea at the time the plea is entered, or falsely denies, or makes a statement inconsistent with, the factual basis set forth in this agreement;
2. Falsely denies prior criminal conduct or convictions;
3. Is untruthful with the Government, the Court or probation officer; or
4. Breaches this plea agreement in any way.

C. FURTHER ADJUSTMENTS AND SENTENCE REDUCTIONS
INCLUDING THOSE UNDER 18 U.S.C. § 3553

Defendant may request or recommend additional downward adjustments, departures, or variances from the Sentencing Guidelines under 18 U.S.C. § 3553. The Government will oppose any downward adjustments, departures, or variances not set forth in Section X, paragraph A above.

D. NO AGREEMENT AS TO CRIMINAL HISTORY CATEGORY

The parties have no agreement as to Defendant's Criminal History Category.

E. "FACTUAL BASIS" AND "RELEVANT CONDUCT" INFORMATION

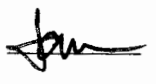
The facts in the "factual basis" paragraph of this agreement are true and may be considered as "relevant conduct" under USSG § 1B1.3 and as the nature and circumstances of the offense under 18 U.S.C. § 3553(a)(1).

F. PARTIES' RECOMMENDATIONS REGARDING CUSTODY

The Government agrees to recommend one year probation as the sentence in this case.

G. SPECIAL ASSESSMENT

The parties will jointly recommend that defendant pay a special assessment in the amount of \$25.00 to be paid forthwith at time of sentencing. The special assessment shall be paid through the office of the Clerk of the District Court by bank or cashier's check or money order made payable to the "Clerk, United States District Court."



H. SUPERVISED RELEASE

The Government is free to recommend a period of supervised release. If the Court imposes a term of supervised release, Defendant will not seek to reduce or terminate early the term of supervised release until Defendant has served at least two-thirds of the term of supervised release and has fully paid and satisfied any special assessments, fine, criminal forfeiture judgment and restitution judgment.

I. AGREEMENT TO RESIGN AND NOT APPLY

Defendant agrees to voluntarily resign from his current employment with the U.S. government and terminate his security clearance. In doing so, he further agrees to waive any and all procedures or remedies available to him pursuant to Executive Order, directive, policy, regulation, or law to challenge or appeal (1) the resignation of his employment or (2) any adverse security determination made by the United States Government concerning the defendant (including the denial or revocation of any security clearance, security approval, or access approval). Defendant further agrees to not seek or apply for a position as a federal law enforcement officer or agent thereafter.

XI

DEFENDANT WAIVES APPEAL AND COLLATERAL ATTACK

Defendant waives (gives up) all rights to appeal and to collaterally attack every aspect of the conviction and sentence. This waiver includes, but is not limited to, any argument that the statute of conviction or Defendant's prosecution is unconstitutional and any argument that the facts of this case do not constitute the crime charged. The only exception is that defendant may collaterally attack the conviction or sentence on the basis that defendant received ineffective

1 assistance of counsel. If defendant appeals, the Government may support
2 on appeal the sentence or restitution order actually imposed.

3 XII

4 BREACH OF THE PLEA AGREEMENT

5 Defendant and Defendant's attorney know the terms of this agreement
6 and shall raise, before the sentencing hearing is complete, any claim
7 that the Government has not complied with this agreement. Otherwise,
8 such claims shall be deemed waived (that is, deliberately not raised
9 despite awareness that the claim could be raised), cannot later be made
10 to any court, and if later made to a court, shall constitute a breach
11 of this agreement.

12 Defendant breaches this agreement if defendant violates or fails
13 to perform any obligation under this agreement. The following are non-
14 exhaustive examples of acts constituting a breach:

- 15 A. Failing to plead guilty pursuant to this agreement;
- 16 B. Failing to fully accept responsibility as established in
- 17 Section X, paragraph B, above;
- 18 C. Failing to appear in court;
- 19 D. Attempting to withdraw the plea;
- 20 E. Failing to abide by any court order related to this case;
- 21 F. Appealing (which occurs if a notice of appeal is filed) or
- 22 collaterally attacking the conviction or sentence in violation
- 23 of Section XI of this plea agreement; or
- 24 G. Engaging in additional criminal conduct from the time of
- 25 arrest until the time of sentencing.

26 If Defendant breaches this plea agreement, Defendant will not be
27 able to enforce any provisions, and the Government will be relieved of
28 all its obligations under this plea agreement. For example, the
Government may proceed to sentencing but recommend a different sentence
than what it agreed to recommend above. Or the Government may pursue

1 any charges including those that were dismissed, promised to be
2 dismissed, or not filed as a result of this agreement (Defendant agrees
3 that any statute of limitations relating to such charges is tolled
4 indefinitely as of the date all parties have signed this agreement;
5 Defendant also waives any double jeopardy defense to such charges). In
6 addition, the Government may move to set aside defendant's guilty plea.
7 Defendant may not withdraw the guilty plea based on the Government's
8 pursuit of remedies for Defendant's breach.

9 Additionally, if Defendant breaches this plea agreement: (i) any
10 statements made by Defendant, under oath, at the guilty plea hearing
11 (before either a Magistrate Judge or a District Judge); (ii) the factual
12 basis statement in Section II.B in this agreement; and (iii) any evidence
13 derived from such statements, are admissible against defendant in any
14 prosecution of, or any action against, defendant. This includes the
15 prosecution of the charge(s) that is the subject of this plea agreement
16 or any charge(s) that the prosecution agreed to dismiss or not file as
17 part of this agreement, but later pursues because of a breach by the
18 Defendant. Additionally, Defendant knowingly, voluntarily, and
19 intelligently waives any argument that the statements and any evidence
20 derived from the statements should be suppressed, cannot be used by the
21 Government, or are inadmissible under the United States Constitution,
22 any statute, Rule 410 of the Federal Rules of Evidence, Rule 11(f) of
23 the Federal Rules of Criminal Procedure, and any other federal rule.

24 XIII

25 CONTENTS AND MODIFICATION OF AGREEMENT

26 This plea agreement embodies the entire agreement between the
27 parties and supersedes any other agreement, written or oral. No
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1 modification of this plea agreement shall be effective unless in writing
2 signed by all parties.

3 **XIV**

4 **DEFENDANT AND COUNSEL FULLY UNDERSTAND AGREEMENT**

5 By signing this agreement, defendant certifies that defendant has
6 read it (or that it has been read to defendant in defendant's native
7 language). Defendant has discussed the terms of this agreement with
8 defense counsel and fully understands its meaning and effect.

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XV


DEFENDANT SATISFIED WITH COUNSEL

Defendant has consulted with counsel and is satisfied with counsel's representation. This is defendant's independent opinion, and defendant's counsel did not advise defendant about what to say in this regard.


Respectfully submitted,

ROBERT S. BREWER, JR.
United States Attorney

8-20-2019
DATED



OLEKSANDRA Y. JOHNSON
Assistant U.S. Attorney

8/1/2019
DATED


JULIE H. LEDESMA
Defense Counsel

IN ADDITION TO THE FOREGOING PROVISIONS TO WHICH I AGREE, I SWEAR UNDER PENALTY OF PERJURY THAT THE FACTS IN THE "FACTUAL BASIS" PARAGRAPH ABOVE ARE TRUE.

8/1/2019
DATED


JASON ANDREW MCGILVRAY
Defendant

Approved by:


BLAIR C. PEREZ
Assistant U.S. Attorney

Rev. 6/27/2017 JSS:dca